MEMORANDUM FOR: THE DIRECTOR

Attached is a short statement having to do with the law pertaining to control of the air with some discussion of its history and possible future developments. The current rule is stated in paragraph 2.

S/ Lawrence R. Houston

LAWRENCE R. HOUSTON
General Counsel

20 MAY 1960

(DATE)

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20 May 1960

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT: International Law on Control of the Air

1. This memorandum is for information only.

2. The current status of international law in regard to control of the air is that every state has complete and exclusive sovereignty over the air space above its territory. The United States acknowledged the principle in signing the Chicago Convention of 1944 on International Civil Aviation. The U.S.S.R. is not a party to the Chicago Convention, but the Soviet Air Code of 1932 states that the U.S.S.R. has complete and exclusive sovereignty over the air space of the U.S.S.R.

3. Even the various theories which claim the right of free passage of foreign aircraft recognize the right of subjacent states to exercise control necessary in their judgment to safeguard and preserve their territory and nationals, and foreign military aircraft or commercial aircraft flying over military areas or populous countries have generally been excepted from the free passage theory. Thus, one of the earliest proponents of freedom of the air, a French lawyer named Fauchille writing in 1901, recognized that a nation needed to have such authority over the air space as might be needed for its own preservation. Among other reasons, he had in mind such peace-time problems as the possibility of espionage from the air. The academic discussion was brought to a head by Bleriot's flight from France to England in 1909, but the legal discussions among the countries were interrupted by World War I. The experiences of that war led the British to put national security above commercial interests and they led the field in recognizing the exclusive sovereignty theory at the Paris Convention in 1919. This has been settled international law ever since.

4. A nation is justified in using such force as may be necessary to stop an illegal intrusion. I can find nothing that would justify a nation utilizing force against foreign bases from which such an intrusion has or may come. No flight is illegal until a boundary has actually been crossed. Flight over the high seas is, therefore, not subject to national control. Illegal intrusions intentional or accidental are not infrequent. There are numerous allegations of Russian military overflights, presumably for intelligence purposes. There have been reports that Russian commercial flights to foreign countries with which the U. S. S. R. has bilaterals have overflown intermediate countries without permission. Protests and diplomatic notes are usually the sole result.

5. The whole principle of exclusive sovereignty to theoretical infinity has been thrown into confusion by the development of satellites and missiles. There has been general acceptance in legal thinking as opposed to political and military thinking that the infinite sovereignty is unrealistic and new rules must be developed. There are three main schools of thought:

a. One maintains in the absence of an international convention nations may project their territory sovereignty as far out into space as they will eventually become capable of extending their coercive power.

b. Another school maintains the problem can be settled only by conventions setting arbitrary limitations to the sovereignty of subjacent states. Proposed boundaries range from the outer limits of the earth's gravitational field to the lowest suggestion coming from a Russian legal writer that all space above the altitude of 20 to 30 kilometers be absolutely free. There are a variety of other proposals between these two.

c. The third school holds that sovereignty in space depends on the nature of the use of space and that those uses which are sharable will be subject to rules of international law while exclusive uses will be subject to the sovereign jurisdiction of the subjacent states. On this theory, each new use would be dealt with ad hoc.

None of these theories has any predominant acceptance and they are not part of accepted international law.

s/ Lawrence R. Houston

LAWRENCE R. HOUSTON
General Counsel

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